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Supreme Court of the United States

No. 542

REPLY BRIEF FOR PETITIONER.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 542

GRACE LINE, INC.,

Petitioner,

v.

FEDERAL MARITIME BOARD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER.

This Reply Brief is submitted in response to the Brief in Opposition submitted by respondents, the United States and the Federal Maritime Board.

Statement of the Case.

A reading of the Brief in Opposition reaffirms the absence of any factual dispute and reemphasizes the fact that the central issue in this case is an important question relating to the construction of the Shipping Act and its impact on international shipping. That issue is whether the Shipping Act applies to and outlaws all contract carrier activities conducted by common carriers—both foreign and domestic—serving United States ports.

The Brief in Opposition, in its statement of the case, does not dispute the basic facts which establish that peti-

tioner is, and always has been, a contract carrier, rather than a common carrier, of bananas.

The Brief in Opposition concedes what the Board itself found: that petitioner's carriage of bananas has always been by "special contract" (p. 6); that the carriage of bananas involves a high degree of specialization (pp. 6-7); that the shipping of bananas requires "a carefully synchronized operation" (p. 6); that "It is vital to the shipper to have his fruit reach the ultimate consumer as quickly as possible" (p. 7); and that the shipper must "know in advance upon what space and ship he can rely to load and carry his shipment" (p. 7). The Brief in Opposition omits to state, but does not deny, the additional important fact that bananas grow continuously and must be harvested and shipped weekly with the consequence that banana shippers must enter into long-term transportation contracts which will insure the availability of space on a precise schedule over a long period of time (Petition, pp. 25a-26a).*

The Brief in Opposition also concedes—by its silence—that:

> In providing contract carriage of bananas petitioner has followed a practice pursued by all regular ocean carriers of bananas (Petition, p. 8).
>
> Petitioner is the first carrier anywhere in the world to be told that it must attempt to operate as a common carrier of bananas (Petition, p. 8).
>
> In barring contract carrier activities by a person engaged in common carriage the Board has placed more stringent controls on international water carriers than are applicable to domestic trains and vessels (Petition, pp. 5; 13, note; 15-19).

* Respondents seek to confuse the issue by their statement that the fact that bananas require a special kind of carriage does not relieve petitioner of "the duty not to discriminate" (Brief in Opposition, p. 17, note 13). The point is, however, that the existence of specialization, together with the absence of a holding out, demonstrates that petitioner is a contract carrier of bananas. The Shipping Act is therefore inapplicable and petitioner may properly provide this specialized service for a limited number of shippers.

Although the Brief in Opposition's statement of the case does not raise any factual issue, it employs several devices in an effort to obscure the central issue of law and to minimize its importance.

First, the entire Brief in Opposition is pervaded by a misleading suggestion that there is no real distinction between common and contract carriage and that any difference is merely a matter of labelling. Thus at page 10 the Brief refers to distinctions based on "the name the carrier uses" in performing certain transportation. Similarly, on page 14 the Brief states that the Board has consistently taken the position that the common carrier must treat all alike "regardless of the label, 'contract' or otherwise, the carrier may attach to the carriage of a particular commodity."

The difference between two essentially different modes of doing business cannot be so lightly dismissed. The distinction between common and contract carriage has a centuries-old basis both in law and in fact. These are two fundamentally different kinds of transportation which involve different legal obligations and consequences, both at common law and under the various statutory patterns applied to persons engaged in the business of transportation.* A common carrier holds himself out to the public to carry goods of certain kinds, or all kinds, for all who wish to ship them. A contract carrier performs a specialized transportation service to fulfill the needs of particular shippers.

The majority opinion below did not regard the difference between contract and common carriers as merely one of labels, nor could it. Thus the opinion made reference to

* For example, the Motor Carrier Act (Part II of the Interstate Commerce Act), 49 U. S. C. §§301 *et seq.* (1958) and the Water Carrier Act (Part III of the Interstate Commerce Act), 49 U. S. C. §§901 *et seq.* (1958), both provide different kinds of regulation for common and contract carriers. This Court has frequently had occasion to consider the differences between these two modes of doing business. *E.g.*, *United States* v. *Contract Steel Carriers*, 350 U. S. 409 (1956).

the separate and distinct concepts "common carrier" and "contract carrier" and, indeed, recognized that there was no doubt that at common law a " 'common carrier' may on occasion carry by contract" (Petition, p. 37a). The record below, and the facts conceded by respondents, make it plain that petitioner is, and has been, a contract carrier of bananas by virtue of the manner in which it has carried that commodity. The central issue presented here, and which respondents' brief seeks to obscure, is whether petitioner's contract carrier activities were outlawed by the Shipping Act of 1916.*

Respondents also seek to obscure the central issue in this case by the persistent use of phrases like "unjustly discriminating" (p. 5). They seek to leave the impression that there was some pernicious motive in petitioner's failure to carry bananas for all who offered them for shipment. All that petitioner did was to make the same determination which has been made by all other regular ocean carriers of bananas, that is, the determination that bananas require the

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* Respondents also seek to obscure the distinction between petitioner's contract carrier and its common carrier activities by certain factual distortions. Respondents make much of the fact that petitioner is a common carrier of Chilean fruit. Respondents' brief fails, however, to note the many significant differences between the transportation of Chilean fruit and the transportation of bananas. Thus the record shows that Chilean fruit can be stored for substantial periods of time at shoreside. This concededly cannot be done with bananas and is one of the crucial factors requiring such careful synchronization in their handling and shipment (R. 60-61; 73-74). There is no evidence in the record that Chilean fruit must be harvested weekly, that Chilean fruit growers require long-term commitments from shippers, that a specific amount of space on a specific vessel is necessary to the trade, that specialized treatment is required during the voyage, that a long-term space commitment is a prerequisite, etc. If respondents are seeking to suggest that petitioner must be treated as a common carrier of bananas because it is a common carrier of the different and distinct commodity of Chilean fruit, they also ignore the important fact that petitioner had admittedly held itself out to the public as a common carrier of Chilean fruit.

The Brief in Opposition also points to the fact that petitioner is a member of the Association of West Coast Steamship Companies, a conference "open only to 'common carriers' " (p. 5). The Brief fails to mention the uncontradicted testimony in the record that the conference agreement was not intended by any of the participants to include banana carriage, which was "understood by all lines to be an exception because of the nature of that article" (R. 35).

offering of a specialized service tailored to the needs of a limited number of shippers. There is of course some selection necessarily involved in providing such service; by its very nature it cannot be offered to everyone. This is the hallmark of contract carriage, and it is the offering of a contract carrier service which constitutes, in and of itself, the "unjust discrimination" to which respondents refer.

Respondents also engage in loose talk about an alleged right "to pick and choose" among shippers (Brief in Opposition, p. 5), with an implied suggestion that petitioner claims a right of arbitrary discrimination among shippers of arbitrarily selected commodities. Petitioner claims no such right; it urges only that it is not barred from acting as a contract carrier when the circumstances demonstrate that contract carriage has been and may properly be conducted. Petitioner has at all times conceded that the Board has authority to determine:

> whether bananas are a specialty,
> whether petitioner has held itself out as a common carrier of bananas by its words or its actions, and
> whether petitioner's contract carriage of bananas has any detrimental effect on its common carriage of other commodities.

Here the Board has conceded that bananas are a specialty, it has conceded that there has been no holding out, and it has found no detrimental effect on petitioner's common carriage. Nevertheless the Board and the Court of Appeals have outlawed petitioner's banana carriage on the doctrinaire view that a common carrier may never act as a contract carrier.

Significantly, the Board has conceded that "a common carrier by water may except certain goods from its holding out to carry . . ." (R. 227) and that petitioner "has not held

itself out as a common carrier of bananas, . . ." (R. 224).* Thus petitioner admittedly has no duty to carry bananas. Respondents would presumably also concede that if petitioner engaged only in the contract carriage of bananas and performed no service as a common carrier, its activities would be unregulated by the Shipping Act and it could carry bananas for whomever it pleased. Yet the juxtaposition of a common carrier and a contract carrier service in the same "entity"—notwithstanding that the contract service involves a completely distinct commodity and leaves the common carrier service unaffected—is flatly condemned. It is this ruling which petitioner challenges here.

I.

The Decision Below Will Have An Important Impact on International Shipping.

Respondents' brief makes no serious effort to challenge petitioner's description of the impact of the decision below or petitioner's estimate of the importance of that decision for international shipping.

Respondents suggest only that petitioner has stated the issue too broadly when it phrases that issue in terms of extending the Shipping Act to all activities of a common carrier by water (p. 12). A reading of the Brief in Opposition itself demonstrates, however, the accuracy of petitioner's statement. Respondents characterize the Board's position as a holding that "as to any goods which petitioner—a common carrier—undertakes to carry, it has a

* Respondents repeat this concession in their brief (p. 10). In a footnote they seek to limit its effect by suggesting that only malodorous materials, dangerous commodities or commodities "unsuitable" for transportation may be excluded from the holding out. No authority is cited, however, for this proposition and the principle stated in the Board's Supplementary Report was not so limited.

duty "to serve similarly situated shippers alike' " (p. 10). This is an accurate reflection of the Board's statement that "the entity which constitutes a 'common carrier by water in foreign commerce' is subject to the provisions of the Act and the jurisdiction of this Board." (Petition, p. 25a). If this does not mean that the Board is extending the Shipping Act to all activities of a common carrier by water, it is impossible to fathom just what it does mean.

Similarly the Brief in Opposition endorses the majority below in its refusal to read the phrase "while acting as such" after the phrase "common carrier" in the Shipping Act. If the statute is not so limited it applies to all activities of a common carrier and raises the issue which petitioner has framed. It is apparent that the "very broad" issue which petitioner has stated and which respondents seek to disclaim is precisely the issue on which the Court of Appeals based its decision.

But even if respondents' "narrower" formulation of the issue is accepted, that formulation does not in fact limit or narrow the impact of the decision. Respondents state the question at issue to be whether the "anti-discrimination" provisions of the Shipping Act apply to the carriage, by a person engaged in common carriage of some commodities, of a commodity which the carrier "has not undertaken to carry" for all who "qualify" (Brief in Opposition, p. 12). Since selective offering of transportation services is an essential characteristic of contract carriage, resolution of the issue stated by respondents in their favor will bar contract carriage by a person engaged in common carriage. It is this result which will have the impact and consequences described in the Petition.

Since the decision in this case will admittedly have a wide-ranging impact on foreign and domestic shipping, it raises a question which requires resolution by this Court.

II.

The Majority Below Misconstrued the Shipping Act.

The most striking feature of respondents' attempt to defend the decision of the majority below is their failure even to mention the many cases cited in the Petition which are in conflict with that decision (Petition, pp. 15-19).

It is apparent that the approach adopted by the majority below is at war with the reasoning of this Court, of other state and federal courts, and of the Interstate Commerce Commission with respect to analogous issues arising under similar statutes. Whereas these other decisions have consistently held that regulatory statutes comparable to the Shipping Act have no application whatever to contract carrier activities, the majority below has held that the Shipping Act applies to every activity of a person engaged in common carriage, whether or not that activity constitutes common carriage. The contrast is exemplified by the ruling of the Court of Appeals for the Sixth Circuit in *United States* v. *Louisville & Nashville Railroad*, 221 F. 2d 698 (6th Cir. 1955):

> "... a common carrier acting outside the performance of its required duties to transport goods which it is not required to carry may contract as a private carrier." (221 F. 2d at 703)

This stands in direct opposition to the Board's statement in its Supplementary Report in this case that:

> "... whatever Grace—a common carrier by water—carries, it carries subject to the provisions of this Act" (Petition, p. 29a).

Respondents make some effort to weaken the force of the cases cited by petitioner by suggesting that none of those cases "involve discrimination" (p. 16).* This attempted distinction is, however, meaningless. The issue is whether any of the provisions of the Shipping Act apply to the contract carrier activities of a person also engaged in common carriage. Petitioner has cited numerous cases which hold that statutes—like the Shipping Act—which regulate common carriers have no application to contract carrier activities. Those cases are equally relevant whether the precise question involved is the setting of rates, refusal of services, or some other requirement of the regulatory statute. In all of these respects a common carrier has a

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* Respondents also appear to suggest that petitioner has not cited cases demonstrating that a contract carrier is free at common law to choose its shippers (Brief in Opposition, p. 16). Any such suggestion is false. It is well settled that under common law principles a contract carrier may provide a specialized service for a limited number of shippers and that he may do so even if he also performs carriage of other commodities as a common carrier. For example, in *Dickson* v. *Great Northern Railway*, 18 Q. B. D. 176, 183 (C. A. 1886), Judge Lindley pointed out that:

> ". . . a company which is not a common carrier of dogs, but which may be in the habit of carrying dogs on certain terms, may at common law decline to accept any particular dog, even on those terms, and may refuse to carry the dog at all . . ."

Similarly, the basic issue in *Express Cases*, 117 U. S. 1 (1886), was whether the railroads could refuse to accommodate express companies when they had carried them only by special contract and never held themselves out as common carriers of such companies; this Court concluded that they could (see 117 U. S. at 26-27). Also, in *Lake Shore & Michigan Southern Railroad* v. *Perkins*, 25 Mich. 329 (1872), the Court upheld the refusal of a railroad to carry plaintiff's livestock on the ground that the railroad was a contract carrier, rather than a common carrier of livestock. Respondents' suggestion that the *Perkins* case concerned only the question whether a railroad could relieve itself of the standard of care imposed on common carriers (Brief in Opposition, p. 16) is inaccurate. Many cases and other authorities have pointed out that one of the essential characteristics of a contract carrier is his freedom to furnish transportation only to those with whom he wishes to deal. For example, in *Mt. Tom Motor Lines* v. *McKesson & Robbins*, 325 Mass. 45, 89 N. E. 2d 3, 5 (1949), the Supreme Judicial Court of Mass. ruled:

> ". . . a contract carrier does not furnish transportation indiscriminately but furnishes only to those with whom he sees fit to contract."

See also *Cleveland, C., C. & St. L. Ry. Co.* v. *Henry*, 170 Ind. 94, 83 N. E. 710 (1908); 1 Hutchinson, *Law of Carriers* 38 (3rd Ed. 1906); 1 *Moore on Carriers* 4 (2d Ed. 1914); Dobie, *Bailments and Carriers* 298 (1914)

duty of providing a uniform service for all who offer cargo for shipment; a contract carrier does not.

Instead of considering the cases cited by petitioner—which cannot be reconciled with the approach of the majority below—respondents cite two cases which have nothing whatever to do with the issue here. In *United States* v. *Baltimore & Ohio Railroad Co.*, 333 U. S. 169 (1948) (Brief in Opposition, p. 13), there was no contract carriage involved. There the railroad was obviously a common carrier of livestock and this Court held that it was not justified in discriminating among shippers with respect to its carriage of this commodity merely because of a contract which the carrier had made.

Similarly, in *Boynton* v. *Virginia*, 81 Sup. Ct. 182 (1960), this Court held that a common carrier of passengers in interstate commerce was barred by the Interstate Commerce Act from racial discrimination against some of those passengers in the lunchroom facilities which the carrier utilized. Petitioner does not quarrel with the proposition that the Shipping Act contains a thorough-going stricture against discrimination of any kind *in common carriage*. The question here is whether the Shipping Act can properly be applied to contract carrier activities. To this issue respondents do not address themselves.

Respondents also attempt to support the decision below by representing that the irreconcilable decisions of the Board are in fact consistent (Brief in Opposition, p. 14). A reading of the Board's decisions demonstrates that they cannot be reconciled. Thus in *Transportation by Mendez & Co.*, 2 U. S. M. C. 718 (1944), the Commission pointed out that "a carrier may be both a common and a contract carrier . . ." (2 U. S. M. C. at 721). In *Consolo* v. *Grace Line, Inc.*, 4 F. M. B. 293, 301 (1953), the Board quoted this language with approval.

The only reason for the Board's ruling adverse to petitioner in the *Consolo* Report was its erroneous view that at common law contract carriage and common carriage cannot take place on the same vessel at the same time. The decision of the Court of Appeals here did not rest on any such principle. Indeed, the Court assumed "*arguendo*" the validity of a contrary rule (Petition, p. 38a).

The Board's view in its Supplementary Report that the Shipping Act applies to a common carrier as an "entity" (Petition, p. 25a) and the adoption of that view by the Court of Appeals are directly at odds with the Board's ruling in *Mendez* and *Consolo* that "a carrier may be both a common and a contract carrier . . ."

It is significant that respondents do not even attempt to fit the Board's "susceptibility theory", asserted in its original Report in this case, into the alleged pattern of "consistency".*

Nor do respondents mention *New York Marine Co.* v. *Buffalo Barge Towing Corp.*, 2 U. S. M. C. 216 (1939), a decision directly contrary to the result here. There the Maritime Commission found that a barge line was a contract carrier unregulated by the Shipping Act even though it also engaged in common carriage under tariffs filed with the Commission. The Commission merely pointed out that the carrier's "service under tariffs is not here in issue . . ." The Commission concluded that it and other barge line

* Respondents attempt to excuse the Board's adoption of the "susceptibility" test by suggesting that petitioner "had relied almost exclusively on the argument that bananas were not as a practical matter 'susceptible' to 'common carriage' . . ." (p. 9). This is not true. Petitioner's position both before the Board and before the Examiner was consistently that its specialized carriage of bananas, not held out to the public, is contract carriage outside the scope of the Shipping Act. The bulk of petitioner's brief to the Board was devoted to this argument. Only in an argument appearing in Point IV of its brief, commencing at page 56, did petitioner argue that bananas were insusceptible of common carriage. Petitioner expressly pointed out there that the only reason why it discussed the susceptibility criterion at all was because the trial examiner had regarded it as determinative.

defendants "are not shown to be common carriers by water in interstate commerce as defined by Section 1 of the Shipping Act, 1916 . . ." (2 U. S. M. C. at 219).

Respondents also miss, or consciously evade, the point of the legislative history cited by petitioner (Petition, pp. 20-22). That legislative history very distinctly indicates that Congress contemplated that a carrier engaged in business as a common carrier, and even a vessel engaged in such business, might also engage in business as a contract carrier. Yet such a view is precisely contrary to the position adopted by the majority below.

Nor does the legislative history support respondents' statement that "tramp steamers are the only carriers, other than ferry boats, which Congress intended to exclude from the Board's jurisdiction" (Brief in Opposition, p. 16). If that were true, the insertion of the word "common" before the word "carrier" would have no effect. Indeed, the Board itself has decisively rejected the very view here expressed by respondents. *Galveston Chamber of Commerce* v. *Saguenay Terminals*, 4 F. M. B. 375, 377-78 (1954).

It is apparent that respondents' brief, like the opinion of the majority below, fails to reconcile the position taken here with the relevant decisions of this and other courts and administrative bodies, the previous rulings of the Board, and the relevant legislative history. Indeed, as Judge Moore pointed out in his dissenting opinion, the ruling of the majority below cannot even be reconciled with the prior decision of the Court of Appeals in this very case (Petition, p. 40a).

III.

The Decision of the Majority Below Constitutes a Departure from the Proper Course of Judicial Proceedings on Review of Administrative Action.

Respondents' only answer to petitioner's argument that the majority below improperly deferred to a ruling of the Board is an argument that the majority did not in fact do what it said it did.

Respondents concede that the opinion below "did indicate" that "the Board was better qualified to decide relevant issues of maritime policy" (pp. 16-17). Respondents, however, apparently take the view that this "indication" by the majority was an irrelevant comment which had nothing to do with its decision.

The lack of merit in respondents' contention is apparent in the fact that the *only authorities* relied on by the majority below in support of the position which it adopted were a quotation from the prologue of the Shipping Act defining what the majority conceived to be the Board's function (Petition, p. 38a) and a decision of the Court of Appeals for the Second Circuit which the majority cited for the proposition that the Board is "*prima facie* better qualified than are courts" to decide certain issues (Petition, p. 39a).

Certainly it must be accepted that the majority decided this case on the basis of the reasoning which it employed in its opinion. That opinion very clearly pointed out that the principal consideration which motivated the decision was the majority's desire to leave the decision of certain issues "within the power of the Board" (Petition, p. 39a). The majority did this because of its view that the Board was better qualified than the courts to decide whether par-

ticular activities of a common carrier "will prejudice the 'developing of a merchant marine' . . ." (Petition, p. 39a).

It is apparent that the majority did, in fact, defer to the ruling of the Board and that its deference was based on the Board's alleged expertise in determining what will advance and what will retard the development of a merchant marine. As the Petition has demonstrated, the Board did not in fact consider this question nor was there in the record any evidence upon which that question might be resolved (pp. 25-29). For this reason, and for the other reasons outlined in the Petition, the majority's deference to the Board was improper.

Conclusion.

The writ of certiorari should issue.

Respectfully submitted,

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